TC07783

Stamp Duty Land Tax – Purchase of property with basement annex – Whether SDLT return amended within statutory time limit – Whether amendment should have been accepted by HMRC – Validity of enquiry – Validity of closure notice – Whether eligible for Multiple Dwellings Relief – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00861
TC/2019/09137

BETWEEN

(1) DAVID MERCHANT
(2) SARAH GATER

Appellants

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE BROOKS

As both parties consented and the Tribunal considered that it was able to do so, this appeal was determined on the papers without a hearing pursuant to Rule 29 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 on the basis of the written submissions of the appellants dated 26 May 2020 and 25 June 2020 and written submissions of the respondents dated 11 June 2020

Louise Wise of Relatus Limited for the Appellant

Jeremy Schryber litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. David Merchant and Sarah Gater appeal against a closure notice issued by HM Revenue and Customs ("HMRC") on 29 June 2018. This amended a stamp duty land tax ("SDLT") return (the "Return"), filed by Mr Merchant and Ms Gater on their acquisition of a property in Kelmscott Road, London (the "Property"), by increasing their liability to SDLT by £64,650.

2. Because of the Covid-19 pandemic, the parties have agreed that the appeal be determined without a hearing on the basis of written submissions. I am grateful to Louise Wise of Relatus Limited ("Relatus") and Jeremy Schryber for their comprehensive and helpful submissions on behalf of Mr Merchant and Ms Gater and HMRC, respectively. Although, carefully considered, it has not been necessary to refer to each and every argument advanced on behalf of the parties in reaching my conclusions.

RELEVANT STATUTORY PROVISIONS

3. Before turning to the material facts it is first convenient to set out the relevant statutory provisions most of which are contained in the Finance Act 2003. Unless otherwise stated, all subsequent references to statutory provisions should be read as references to the provisions of that Act.

4. At the time Mr Merchant and Ms Gater acquired the property they were required by s 76 to deliver a "land transaction return" to HMRC, with a self-assessment of the SDLT due on the basis of the information shown on it, within 30 days of the transaction. The applicable rates of SDLT varied, in accordance with s 55, depending on whether the land concerned consisted entirely of residential or non-residential property and if it was "one of a number of linked transactions".

5. Other material sections provide:

> **58D Transfers involving multiple dwellings**
>
> (1) Schedule 6B provides for relief in the case of transfers involving multiple dwellings.
>
> (2) Any relief under that Schedule must be claimed in a land transaction return or an amendment of such a return.
>
> …
>
> **83 Formal requirements as to assessments, penalty determinations etc**
>
> (1) An assessment, determination, notice or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty under this Part must be in accordance with the forms prescribed from time to time by the Board and a document in the form so prescribed and supplied or approved by the Board is valid and effective.
>
> (2) Any such assessment, determination, notice or other document purporting to be made under this Part is not ineffective—
>
> (a) for want of form, or
>
> (b) by reason of any mistake, defect or omission in it,
>
> if it is substantially in conformity with this Part and its intended effect is reasonably ascertainable by the person to whom it is directed.
>
> (3) The validity of an assessment or determination is not affected—
>
> (a) by any mistake in it as to—

(i) the name of a person liable, or

(ii) the amount of the tax charged, or

(b) by reason of any variance between the notice of assessment or determination and the assessment or determination itself.

6. The following paragraphs of schedule 6B are also applicable in the present case:

2 Transactions to which this Schedule applies

(1) This Schedule applies to a chargeable transaction that is—

(a) within sub-paragraph (2) or sub-paragraph (3), and

(b) not excluded by sub-paragraph (4).

(2) A transaction is within this sub-paragraph if its main subject-matter consists of—

(a) an interest in at least two dwellings, or

(b) an interest in at least two dwellings and other property.

(3) A transaction is within this sub-paragraph if—

(a) its main subject-matter consists of—

(i) an interest in a single dwelling, or

(ii) an interest in a single dwelling and other property,

(b) it is one of a number of linked transactions, and

(c) the main subject-matter of at least one of the other linked transactions consists of—

(i) an interest in some other dwelling or dwellings, or

(ii) an interest in some other dwelling or dwellings and other property.

(4) A transaction is excluded by this sub-paragraph if—

(a) section 74 or 75 applies to it,

(aa) paragraph 3 of Schedule 4A applies to it, or

(b) relief under Schedule 7 or Schedule 8 is available for it or would be available for it on the making of a claim or has been withdrawn from it.

…

4 The relief

(1) If relief under this Schedule is claimed for a relevant transaction, the amount of tax chargeable in respect of the transaction is the sum of—

(a) the tax related to the consideration attributable to dwellings (see paragraph 5(1) and (2)), and

(b) the tax related to the remaining consideration (if any) (see paragraph 5(7)).

(2) "The consideration attributable to dwellings" is—

(a) for a single dwelling transaction, so much of the chargeable consideration for the transaction as is attributable to the dwelling,

(b) for a multiple dwelling transaction, so much of the chargeable consideration for the transaction as is attributable to the dwellings in total.

(3) "The remaining consideration" is the chargeable consideration for the transaction less the consideration attributable to dwellings.

...

(5) If the whole or part of the chargeable consideration for a relevant transaction is rent, sub-paragraph (1) has effect subject to section 56 and Schedule 5.

(6) "*Attributable*" means attributable on a just and reasonable basis.

…

5 The amount of tax chargeable

(1) For the purposes of paragraph 4(1)(a), "the tax related to the consideration attributable to dwellings" is determined as follows—

Step 1

Determine the amount of tax that would be chargeable under section 55 on the assumption that—

(a) the relevant land consisted entirely of residential property, and

(b) the relevant consideration were the fraction produced by dividing total dwellings consideration by total dwellings.

Step 2

Multiply the amount determined at Step 1 by total dwellings.

Step 3

If the relevant transaction is one of a number of linked transactions, go to Step 4.

Otherwise, the amount found at Step 2 is the tax related to the consideration attributable to dwellings.

Step 4

Multiply the amount found at Step 2 by—

(CD)/(TDC)

where—

"*CD*" is the consideration attributable to dwellings for the relevant transaction, and

"*TDC*" is total dwellings consideration.

…

7 What counts as a dwelling

(1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.

(2) A building or part of a building counts as a dwelling if—

(a) it is used or suitable for use as a single dwelling, or

(b) it is in the process of being constructed or adapted for such use.

…

7. Further provisions regarding the filing of an SDLT return and the power of HMRC to enquire into a return are contained in schedule 10. Paragraph 2 of that schedule provides that references to the "filing date" are "to the last day of the period within which the return must be delivered". In this case, under s 76(1), this was not later than 30 days after the transaction.

8. Other paragraphs of schedule 10 relevant to this appeal provide:

> **6 Amendment of return by purchaser**
>
> (1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.
>
> (2) The notice must be in such form, and contain such information, as the Inland Revenue may require.
>
> (2A) If the effect of the amendment would be to entitle the purchaser to a repayment of tax, the notice must be accompanied
>
> by—
>
> (a) the contract for the land transaction; and
>
> (b) the instrument (if any) by which that transaction was effected.
>
> (3) Except as otherwise provided, an amendment may not be made more than twelve months after the filing date.
>
> …
>
> **12 Notice of enquiry**
>
> (1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—
>
> (a) to the purchaser,
>
> (b) before the end of the enquiry period.
>
> (2) The enquiry period is the period of nine months—
>
> (a) after the filing date, if the return was delivered on or before that date;
>
> (b) after the date on which the return was delivered, if the return was delivered after the filing date;
>
> (c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser).
>
> This is subject to the following qualification.
>
> (2A) If—
>
> (a) the Inland Revenue give notice, within the period specified in sub-paragraph (2), of their intention to enquire into a land transaction return delivered under section 80 (adjustment where contingency ceases or consideration is ascertained), 81 (further return where relief withdrawn), 81A (return or further return in consequence of later linked transaction) or paragraph 6 of Schedule 6B (adjustment for change of circumstances), and
>
> (b) it appears to the Inland Revenue to be necessary to give a notice under this paragraph in respect of an earlier land transaction return in respect of the same land transaction,
>
> a notice may be given notwithstanding that the period referred to in sub-paragraph (2) has elapsed in relation to that earlier land transaction.

(3) A return that has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under paragraph 6.

…

23 Completion of enquiry

(1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a "closure notice") inform the purchaser that they have completed their enquiries and state their conclusions.

(2) A closure notice must either—

(a) state that in the opinion of the Inland Revenue no amendment of the return is required, or

(b) make the amendments of the return required to give effect to their conclusions.

(3) A closure notice takes effect when it is issued.

FACTS

9. The Property was jointly acquired by Mr Merchant and Ms Gater on 24 March 2016 for £1,920,000. On the same day the Return was completed by their conveyancer and filed with HMRC on the basis that the Property was a single residential property. No relief was claimed and the SDLT shown as due on the Return was £144,150. This was paid on 25 March 2016.

10. Mr Merchant, in his witness statement describes the Property as, "a terraced property which consists of a main house and an annex". He explains that, "the main house is accessed via a front door leading to a common hallway, it comprises a reception room, kitchen/dining room, four bedrooms and three bathrooms." The annex is also accessed, "through the main dwelling front door and along a common hallway to a staircase leading to the Lower Ground Floor. The annex comprises a kitchen, shower room, living room and bathroom."

11. In April 2017 Mr Merchant and Ms Gater were advised, in the light of that description, the basis of the legislation and HMRC guidance applicable at the time, that an application could have been made for Multiple Dwellings Relief ("MDR") and the amount of SDLT reduced as a result.

12. On 20 April 2017 Relatus, on behalf of Mr Merchant and Ms Gater, wrote to HMRC to request an amendment to the Return, under paragraph 2 of schedule 6B, and for a refund of overpaid SDLT of £64,650 calculated in accordance with paragraph 5(1) of that schedule. An attachment to the letter explained that:

"The single transaction to acquire the [Property] should have been treated as a multiple dwelling transaction for 2 dwellings for the purposes of SDLT calculation

The transaction comprises a main dwelling consisting of the upper ground, 1st and 2nd floors and the Annex on the lower ground floor all located within the same building.

- The Annex was and is part of the building consisting of the entire lower ground floor.
- The Annex has a kitchen area which is suitable for that purpose.
- The Annex has its own bathroom with toilet.
- The Annex has living and sleeping accommodation.
- The Annex has cooking, washing and sanitary amenities.

- The Annex does not have independent external access but notwithstanding this it still qualifies as a separate dwelling in accordance with HMRC practice as the Annex is accessed via a common entrance and hallway leading to stairs from the upper to lower ground floor.

With these attribute the [P]roperty clearly comprises two dwellings each suitable for uses as a single dwelling and therefore qualifies as a "multiple dwelling transaction" and is eligible for [paragraph 5 schedule 6B] relief."

13. The letter also explained that although a copy of the contract of sale for the Property and copy of the TR1 Transfer Document, which were being provided by Mr Merchant's and Ms Gater's previous agent, were not attached they would be provided by Relatus, "as soon as we have them". These documents were subsequently sent to HMRC on 4 May 2017 following which the SDLT return was amended on the basis that MDR applied. The SDLT was accordingly reduced by £64,650 to £79,500.

14. HMRC wrote to Mr Merchant and Ms Gater on 29 January 2018 to open an enquiry into the amendment to the Return. A schedule attached to the enquiry letter set out the information required by HMRC in relation to the Property. On 6 February 2018 Relatus responded to HMRC's enquiry letter setting out a full response. I have taken the questions from the schedule to HMRC's enquiry letter and after each question have summarised (in *italics*) the answer provided by Relatus in its letter of 6 February 2018:

Q: does the Annex have a separate title number? Please provide supporting evidence.

A: *the Annex does not have a separate title number as the title register is "of* ***land*** *not* ***dwellings****"* (emphasis as in Relatus letter of 6 February 2018).

Q: Is the Annex capable of being sold separately? Please provide supporting evidences

A: *The Annex is capable of being sold separately as a leasehold property. The property is mid terrace in a run of properties that are identical. The adjacent property has two leaseholds 84A and 84B granted from the overarching Freehold. This is a clear demonstration that should the owners be so minded they could grant and sell a lease for either dwelling comprised within their overall freehold interest.*

Q: Does the Annex have separate council tax billing, please provide supporting evidences?

A: *The Annex does not currently have a separate Valuation Office Agency listing but has previously and if let out would be separately listed again.*

Q: Do the Annexes have separate postal addresses?

A: *Although the Annex does not have a separate postal address it could do on application to the Postcode Address File ("PAF") maintained by Royal Mail. The current occupiers have no need to maintain separate postal addresses as the Annex is not currently occupied. Should this change appropriate application will be made to the PAF.*

Q: Do the Annexes each have separate gas and electricity meters? Please provide supporting evidences.

A: *Although there are no separate utility meters due to the current occupancy of the Property these could be installed at any time should the Annex be rented to a third party.*

Q: Could you confirm if each of the Annexes have any security facilities?

A: *The alarm system in the Annex is zoned separately from the main house and is controlled from the common entrance area.*

Q: Please provide any other relevant information about the properties/ Annexes.

A: *See next answer*

Q: Could you please confirm how you have calculate the multiple dwelling relief for each of the Annexes.

A: *Full information was provided with the application to amend the SDLT return which answers both of the above questions.*

Q: Can you let me have the details of the individuals that live within each of the dwelling?

A: *The entire building is occupied by the purchasers (ie Mr Merchant and Ms Gater). The answer continues by explaining that reliance for relief is placed on the statutory test of "suitability for use" and not the test of actual use and accordingly the identity of the current occupiers is irrelevant to an assessment of "suitable for use as a single dwelling".*

Q: Please provide evidence of the vendor's Multiple Dwelling Relief (MDR) use immediately before, immediately after and at the effective date of acquisition.

A: *A full answer would involve disclosure of information concerning a 3rd party which cannot reasonably be expected to be known by the purchaser.*

15. On 9 March 2018 the HMRC officer handling the matter responded to the 6 February 2018 letter from Relatus, in the following terms:

"I have considered the information for your application for Multiple Dwellings Relief (MDR) and I shall response in the order raised.

1) You have treated the rooms in the basement as a separate dwelling and I believe having that rooms in the basement registered with land registry would have served as an indicator that there is a separate dwelling.

2) You have not provided any supporting evidence to indicate if the rooms in the basement is capable of being sold separately, that would have suggested the rooms in the basement is suitable to be used as a separate dwelling.

You advised that you would be prepared to source a local estates agent's opinion to determine if the rooms in the basement is capable of being sold separately, however we would accept evidence from the relevant authority such as the local council planning authority.

HMRC is unable to comment on matters concerning any unconnected properties with regards to this transaction due to customer confidentiality.

3) The absence of council tax at the effective date of transaction, does not support the fact that the rooms in the basement is suitable to be used as a single dwelling, providing such evidence would have served as an indicator that the rooms in the basement is suitable to be used as a separate dwelling.

4) We sought evidence of separate postal address which would have also served as an indicator to determine if there was a separate dwelling, however the absence of the rooms in the basement not having its own

> separate postal address does not support the rooms in the basement being suitable to be used or is used as a separate dwelling.
>
> 5) You have stated the rooms in the basement does not have its own separate utility supply, this indicates the rooms in the basement is reliant on the residents of the main house for the basic supply of electricity and gas. This indicates the rooms in the basement is not suitable to be used as a separate dwelling. HMRC considers what the uses was at the effective date of transaction rather than any future uses. Therefore we cannot accept what may be possible with the property in the future for the purpose of MDR.
>
> 6) The floor plan you have previously provided specifies that there is only one entrance to the house and all the rooms appears to be part of one house so this indicates that there is only one dwelling instead of two separate dwellings. This indicates these rooms are not suitable to be considered as a separate dwelling, rather these are just a part of the main house and also dependent on the main house for the reliant of accessibility and basic needs such as a utility supply.
>
> I have considered all the above factors to determine if the rooms in the basement are separate from the main house, for it to be suitable for use as a single dwelling. Whilst any individual aspect may not alone be a decisive factor in determining the validity for a claim to MDR. I have concluded on balance from the information and evidence you have provided that you do not qualify for MDR.
>
> I have amended your SDLT return to reflect my findings.
>
> - It previously showed that you were due to pay £79,500
> - It now shows that you are due to pay £144,150
> - The difference is £64,650."

16. Relatus responded on 14 March re-stating the arguments on behalf of Mr Merchant and Ms Gater and taking issue with HMRC's position. Further correspondence dealt with a question in relation to interest which is not part of the appeal. I was not provided with the correspondence between the parties dated 13 and 20 June 2018 but understand that it concerned the use of an incorrect reference and is not material to the appeal.

17. HMRC closed the enquiry by way of closure notices issued to Mr Merchant and Ms Gater on 29 June 2018. These amended the Return increasing the SDLT due by £64,650 to £144,150. The closure notice letters to Mr Merchant and Ms Gater (to whom HMRC wrote separately but in identical terms) concluded:

> "We have received your agent's letter dated 20 June 2018 and I have concluded this enquiry based on the information they have provided."

18. This conclusion was upheld on 22 January 2019 following a review. On 11 February 2019 Mr Merchant appealed to the Tribunal. Ms Gater was joined as a party to the proceedings on 31 October 2019.

DISCUSSION AND CONCLUSION

19. The parties agree that the appeal raises the following issues:

(1) what was the date, in law, that the Return was amended;

(2) whether, if it was not given within the statutory time limit, HMRC should have accepted notice of the amendment and amended the Return;

(3) whether HMRC's enquiry into the Return, as amended, was valid; and

(4) whether the closure notice was valid.

20. If HMRC correctly accepted the amendment to the Return, and the enquiry and closure notice were valid, a further issue arises in relation to whether Mr Merchant and Ms Gater were, as they contend, entitled to MDR on the purchase of the Property.

Date of amendment

21. HMRC contend that the date the Return was amended was 5 May 2017, the date of receipt by them of the letter, dated 4 May 2017, from Relatus enclosing the contract of sale for the Property and copy of the TR1 Transfer Document.

22. Ms Wise, for Mr Merchant and Ms Gater, submits that the letter of 20 April 2017, which contained all the necessary information to enable the Return to be amended and recalculated the SDLT due, was a valid amendment of the Return and therefore the applicable date. She says the letter of 4 May 2017 added nothing in relation to the amendment or applicability of MDR.

23. Although HMRC have not prescribed a particular form or specified the information required under paragraph 6(2) of schedule 10, it is clear from paragraph 6(2A) that "if the effect of an amendment would be to entitle a purchaser to a repayment of tax it **must** be accompanied by a contract for the land transaction and instrument by which the transaction was effected" (emphasis added). This is a mandatory requirement and even though these documents are not required when a claim for MDR is made in an SDLT return or if the effect of an amendment is not the repayment of tax, the statute is clear that they are required in the case of an amendment if the effect of the amendment is to entitle a purchaser to a repayment of SDLT.

24. It is also clear, in my judgment, that if the effect of an amendment is to entitle a purchaser to a repayment of SDLT, given the statutory language – ie "must be accompanied" – it will not be valid unless and until the prescribed documents are provided to HMRC. Until then the amendment is not complete as the required documents are an integral part of the process of the amendment and not ancillary to it, solely for the purpose of enabling a repayment to be made.

25. In the present case, the required documents to satisfy the statutory requirements to amend the Return were provided to HMRC on 5 May 2017. This was therefore the earliest date on which the Return could have been amended.

26. It is clear from paragraph 6(3) of schedule 10 that an amendment "may not be made more than twelve months after the filing date". Under paragraph 2 of schedule 10, the filing date, was "the last day of the period within which the return must be delivered". At the time Mr Merchant and Ms Gater purchased the Property this was 30 days after the transaction. As the Property was acquired on 24 March 2016 the filing date was 23 April 2016 and it was therefore necessary for an amendment to have been made by 23 April 2017.

Should the amendment have been accepted

27. Given my conclusion that the amendment could not have been made before 5 May 2017, when the required documents were provided to HMRC, it follows that the amendment to the Return was not made on time. However, as is clear from the enquiry letter of 29 January 2018, the amendment to the Return was treated as a valid amendment and accepted as such by HMRC. It is therefore necessary to consider whether HMRC should have accepted the late amendment to the Return.

28. HMRC contend that it is "well established" that HMRC have discretion to accept something done late by a taxpayer, in appropriate circumstances and cite as an example the

observation of Sir Thomas Bingham MR (as he then was) in *R v Inland Revenue Commissioners, ex parte Unilever plc and related application* [1996] STC 681 at 685, that:

> "At the relevant time the Revenue enjoyed no express statutory power to extend or waive that two-year time limit, which on its face bound both the Revenue and companies seeking to set off losses against profits in the same accounting year. But s 1(1) of the Taxes Management Act 1970 provided that corporation tax should be under the care and management of the Commissioners of Inland Revenue, and it is common ground on these appeals that the Revenue had a discretion under that section to accept late claims for loss relief. Under what is now s 393A(10) of the 1988 Act, not in force at the material time, claims for loss relief must be made within two years of the end of the accounting period 'or within such further period as the Board may allow'. This express new statutory discretion is not said to vary the discretion which the Board already enjoyed under s 1 of the Taxes Management Act 1970."

29. HMRC submit that s 5 of the Commissioners for Revenue and Customs Act 2005 is essentially the successor to section 1(1) of the Taxes Management Act 1970 and that the "collection and management" power in s 5 Commissioners for Revenue and Customs Act 2005 is the equivalent of the old "care and management" power in the TMA by virtue of s 51(3) Commissioners for Revenue and Customs Act 2005 and refer to the decision of the Upper Tribunal (Fancourt J and Judge Sinfield) in *R (on the application of Ames) v HMRC* [2018] STC 1704 which at [41] commented, in relation to claim for relief Enterprise Investment Scheme ("EIS"):

> "It is common ground that HMRC has jurisdiction under their care and management responsibilities in s 5(1) of the Commissioners for Revenue and Customs Act 2005 to admit a late claim for EIS relief. This discretion is unfettered."

30. HMRC's discretion to admit a late amendment is not common ground in this case, Ms Wise contends that *Unilever* and *Ames* can be distinguished on their facts and additionally says that neither concern SDLT. However, I not only consider that HMRC has such discretion but that it is not subject to the jurisdiction of the Tribunal. As the Upper Tribunal (Warren J and Judge Bishopp) observed in *HMRC v Hok Limited* [2013] STC 225 at [56]:

> "Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at [36] and [43], above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct."

31. Accordingly, I am not able to consider whether HMRC should have accepted the late amendment to the Return. For present purposes it is sufficient to note that the amendment was accepted.

Validity of enquiry

32. In essence, Ms Wise contends that HMRC's enquiry into the amendment to the Return was not made within nine months of 21 April 2017 when HMRC received notice of the amendment as required by paragraph 12(2)(c) of schedule 10 and therefore cannot be valid.

33. However, having concluded that the amendment to the Return was made on 5 May 2017 and it is not disputed that HMRC opened the enquiry by letter of 29 January 2018, it follows that the enquiry did commence within nine months of the amendment and is therefore valid

Validity of closure notice

34. Ms Wise accepts that it is clear from the correspondence that HMRC had rejected the claim for MDR but, as this was not stated in either the closure notice or the letter referred to in the closure notice, she questions whether, because it does not state the officer's conclusions as required by paragraph 23 of schedule 10, the closure notice can be valid.

35. HMRC accept that the closure notice "did not explicitly set out the conclusions of HMRC's enquiry, nor did it explicitly refer to conclusions set out in earlier correspondence." However, their primary argument is that any deficiency in the closure notice is capable of being rectified under s 83 on the basis that the closure notice was an "other document" within s 83(1) and Mr Merchant and Ms Gater had been notified of HMRC's conclusions by letter of 9 March 2018 which made it clear that the claim for MDR had been rejected (see paragraph 15, above). The alternative argument advanced by HMRC is that as there is no particular formality as to the form of a closure notice which may consist of more than one document, the letter of 9 March 2018, which was copied to both Mr Merchant and Ms Gater, taken together with the closure notice, constituted a valid closure notice within the meaning of paragraph 23 of Schedule 10.

36. In *R (on the application of Archer) v HMRC* [2018] STC 38 the Court of Appeal considered s 114 of the Taxes Management Act 1970 which, like s 83, provides that an assessment made in pursuance of the Taxes Acts is not ineffective "by reason of a mistake, defect or omission therein if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding". Lewison LJ, (with whom Asplin and Longmore LJJ agreed), said

> "**[35]** This court considered the scope of s 114 in *Revenue and Customs Comrs v Donaldson* [2016] EWCA Civ 761, [2016] STC 2511, [2016] 1 WLR 4521. That case concerned the payment of penalties for the late filing of a tax return. The statutory provisions required HMRC to give notice to the taxpayer: in one case 'specifying the date from which the penalty is payable' and in another case stating 'in the notice the period in respect of which the penalty is assessed'. HMRC's paperwork did not comply with these requirements. The taxpayer's argument that s 114 could not apply because the notices failed to state any period at all failed. As Lord Dyson MR pointed out, s 114 covers omissions as well as mistakes or defects. So the fact that the closure notices did not in fact amend Mr Archer's self-assessments is not necessarily a knock-out blow. The court held that s 114 did cure the omission. At [28] Lord Dyson endorsed the observation of Henderson J in *Pipe v Revenue and Customs Comrs* [2008] EWHC 646 (Ch), [2008] STC 1911 that some mistakes may be 'too fundamental or gross' to fall within s 114. Mr Goldberg argued that a document which did not charge to tax was fundamentally different to one that did; and that an omission to charge to tax was indeed a mistake that was so fundamental that it could not be saved by s 114. However, as Ms Nathan submitted, Lord Dyson did not approach the question from some a priori categorisation of what kind of mistakes were fundamental or gross. Instead he concentrated on the nature and effect of the omission in the particular circumstances of the case. Lord Dyson reasoned as follows at [29]:
>
> > 'In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of s 114(1).

> Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010–11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of s 114(1) is that the omission does not affect the validity of the notice.'

[36] Although this passage is worded in terms that might suggest that the question was whether Mr Donaldson *himself* was misled, the test under s 114 must be an objective one: see *Pipe v HMRC* at [51]. However, in applying an objective test the reader of the closure notice must, I think, be taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the enquiry and what HMRC's conclusions were. This is consistent with *Bristol & West* at [26] and [38].

[37] The judge found on the facts that:

(i) Mr Archer had been notified of HMRC's position, including the precise sums said to be due, by the APNs and the FNs before the date of issue of the closure notices.

(ii) The closure notices made it clear that HMRC were rejecting the whole of Mr Archer's claims for loss relief.

(iii) Neither Mr Archer nor KPMG challenged HMRC's arithmetic; and KPMG could have done the arithmetic themselves.

(iv) HMRC did in fact amend Mr Archer's online returns and they were visible on HMRC's website.

(v) Although the conclusions in the closure notices were brief, they were sufficient to enable Mr Archer to understand where he stood with HMRC.

[38] It was for those reasons that the judge concluded that at [101] that, on a hypothetical appeal to the FTT, the FTT would have remedied the omission by the application of s 114. Mr Archer does not have (nor did he ask for) permission to appeal against these findings of fact or the value judgment to which they led.

[39] I do not consider that in reaching that conclusion the judge applied the wrong legal test. On the contrary, applying the test in *Donaldson*, Mr Archer's liability could have been easily worked out, and he can have been in no doubt what he owed HMRC. He had in addition been informed by the APNs what HMRC asserted was his liability. He could not have been confused or misled. KPMG themselves had said in support of their application to the FTT that there was no amount of tax for 2001/2 which remained uncertain. HMRC's omission to amend his return to accord with their conclusions was, in my judgment, a matter of form rather than substance on the particular facts of this

> case. I would hold, therefore, that the closure notices were validated by s 114; and that s 114 applies irrespective of the forum in which it is relied on."

37. Adopting the reasoning of Lewison LJ and applying it to the present case, I consider that even though it did not state the officer's conclusion, the closure notice, was "substantially in conformity" with the legislation and, as a result of the previous correspondence, in particular HMRC's letter of 9 March 2018, its intended effect which was to deny Mr Merchant and Ms Gater MDR was "reasonably ascertainable by the person to whom it is directed" as can be seen from the Notice of Appeal and the 'Appellants Fully Particularised Grounds of Appeal' filed and served by Relatus on 24 May 2019. It therefore follows that the closure notice is effective by virtue of s 83 and therefore valid.

MDR

38. Having concluded that the enquiry and closure notice are valid it is necessary to consider whether Mr Merchant and Ms Gater are, as they contend, eligible for MDR on the purchase of the Property.

39. Ms Wise, on their behalf, submits that they are entitled to MDR as the purchase of the Property was a transaction that consisted of an interest in "at least two dwellings" within paragraph 2(2) of schedule 6B. This, she says, is because the Annex is "suitable for use as a single dwelling" and constitutes a separate "dwelling" within the meaning of paragraph 7(2)(a) of schedule 6B for the following reasons:

(1) It can be accessed through the main house using a common hallway leading to a separate staircase to the Annex;

(2) It has its own living and sleeping accommodation;

(3) It has its own kitchen;

(4) It has its own bathroom and toilet; and

(5) It has its own sanitary, cooking and washing facilities.

40. Although it is accepted that the Annex, or basement as HMRC refer to it, has some features that are also present in self-contained living accommodation, such as a living room, bedroom, utility room and a WC/shower room, HMRC submit that does not make it a single dwelling separate from the rest of the Property but, if looked at in the round, the Property as a whole was a single dwelling.

41. In *Fiander & Anor v HMRC* [2020] UKFTT 190 (TC) the issue before the Tribunal (Judge Citron and Mrs Neill) was whether a main house and an annex acquired as part of a residential property, each with its own living accommodation, and connected by a short corridor, were both "suitable for use as a single dwelling", such that the acquisition qualified for MDR. At [51] of its decision the Tribunal approached the issue of "suitability for use":

> "… as an objective determination to be made on the basis of the physical attributes of the property at the relevant time. Suitability for a given use is to be adjudged from the perspective of a reasonable person observing the physical attributes of the property at the time of the transaction"

It continued:

> "52. A dwelling is the place where a person (or a group of persons) lives. A building or part can be suitable for use as a dwelling only if it accommodates all of a person's basic domestic living needs: to sleep, to eat, to attend to one's personal and hygiene needs; and to do so with a reasonable degree of privacy and security. By requiring that the building or part be suitable for use as a "single" dwelling, the statutory language emphasises suitability for self-

> sufficient and stand-alone use as a dwelling. Use as a "single" dwelling excludes, in our view, use as a dwelling joined to another dwelling
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> …
>
> 61. In our view, a building (or part) is "suitable" for a use if it can generally be so used. So, if one has a situation where a building (or part) is suitable for a use only in quite specific circumstances, this inclines against determining that the building is "suitable" for that use. That is our situation here: an objective observer of the property at completion could have envisaged circumstances where main house and annex could be used individually as dwellings (see [59] above), but only if a very particular kind of relationship were to subsist between the occupants of the two parts. Absent such a relationship - which would be the case where the occupant of the annex was a member of the general public - the main house and the annex would not be individually suitable for use as dwellings, due to the insufficiency of privacy and security for occupants of both parts. As we say, this inclines against a determination that both parts were suitable for use as dwellings.
>
> 62. This inclination is only strengthened when we turn to our second question, the effect of the corridor on the suitability of the main house and annex for use as "single" dwellings. The corridor as a physical feature compromised the stand-alone quality of both main house and annex as dwellings - and, in our view, the word "single" imports a requirement of suitability for use on a stand-alone basis. Due to the short, open corridor connecting them, the main house and annex were simply too closely physically connected for either to be suitable for use as a "single" dwelling. Rather - and this, indeed, is how the property was marketed, on the evidence of the "rightmove" materials - the property was eminently suitable for use as one joined dwelling.
>
> …
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> 67. Our inclination is strengthened by the point we make at the end of [62] above - that in the eyes of an objective observer at completion, the main house and annex were eminently suitable for use as one joined dwelling. In such circumstances it seems to us that such an observer would not reasonably conclude that they were suitable for a different sort of use on the basis of a new physical feature being added."

42. That there are factual similarities between *Fiander* and the present case is clear and obvious, albeit in this case access to the Annex is through the "main house using a common hallway" rather than a connecting corridor. Indeed this was the basis of an application by Mr Merchant and Ms Gater that this appeal be stayed pending the decision in *Fiander*. Although, as a decision of the First-tier Tribunal it is not binding, having regard to all of the circumstances I consider it appropriate to adopt the reasoning of the Tribunal in *Fiander* particularly at [61], [62] and [67] leading to the inevitable conclusion that the claim for MDR in the present case cannot succeed.

43. Therefore for the reasons above the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 20 July 2020

Amended in accordance with Rule 37 of The Tribunal Procedure (First–tier Tribunal) (Tax Chamber) Rules 2020 on 5 August 2020